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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 KENNETH M. SUTTON,

12 Petitioner,

13 v.

14 STATE OF WASHINGTON,

15 Respondent.

Case No. C08-5358RBL

REPORT AND
RECOMMENDATION

Noted for **September 19, 2008**

16 Petitioner is a Washington State prisoner currently incarcerated in Florence, Arizona. Petitioner
17 seeks habeas relief under 28 U.S.C. § 2254 challenging his 2003 Pierce County conviction and sentence
18 for first degree burglary and second degree assault. After a careful review of the record, the undersigned
19 submits the following report and recommends that the Court deny the petition for writ of habeas corpus as
20 a second or successive petition.

21 DISCUSSION

22 The Antiterrorism and Effective Death Penalty Act of 1996, which was signed into law on April
23 24, 1996, section 2244(b)(3)(A) of the Act, states:

24 Before a second or successive application permitted by this section is filed in the district
25 court, the applicant shall move in the appropriate court of appeals for an order authorizing
the district court to consider the application.

26 In answer to the Petition, Respondent argues the Court lacks jurisdiction over this matter because
27 this is Petitioner's second federal petition for writ of habeas corpus, filed without the requisite permission
28 from the Ninth Circuit. The undersigned agrees.

1 In 2007, Sutton filed his first federal habeas corpus petition challenging his custody under the
2 state court judgment and sentence. Exhibit 2, Petition, Sutton v. Gay, United States District Court Cause
3 No. C07-5148RBL/KLS. The Court dismissed the petition with prejudice. Exhibit 3, Report and
4 Recommendation (Docket # 19), Sutton v. Gay, United States District Court Cause No.
5 C07-5148RBL/KLS; Exhibit 4, Order, Sutton v. Gay, United States District Court Cause No.
6 C07-5148RBL/KLS; Exhibit 5, Judgment, Sutton v. Gay, United States District Court Cause No.
7 C07-5148RBL/KLS. Petitioner's appeal from the denial of the first petition remains pending before the
8 Ninth Circuit.

9 Petitioner has now filed a second habeas corpus petition challenging his custody under the state
10 court judgment and sentence. Petitioner admits the current petition is his second habeas corpus petition,
11 but he asserts the petition is proper because the claim in the petition is based upon the ruling in Blakely v.
12 Washington, 542 U.S. 296 (2004). Petition, at 1. Because Petitioner has previously challenged his
13 custody under the judgment and sentence, his current petition is a "second or successive" petition. Burton
14 v. Stewart, 127 S. Ct. 793, 796-99 (2007). Petitioner must obtain permission from the Ninth Circuit
15 before he may file the current petition. Id. Until Sutton obtains permission from the Ninth Circuit the
16 Court lacks jurisdiction over the matter.

17 CONCLUSION

18 Based on the foregoing, the Court should deny and dismiss the petition for writ of habeas corpus
19 without prejudice to allow Plaintiff the opportunity to seek the requisite permission. Respondent's
20 motion to dismiss the petition should be GRANTED.

21 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the
22 parties shall have ten (10) days from service of this Report to file written objections. *See also*
23 Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes of
24 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the
25 clerk is directed to set the matter for consideration on **September 19, 2008**, as noted in the caption.

26 DATED this 26th day of August, 2008.

27 /s/ J. Kelley Arnold
28 J. Kelley Arnold
United States Magistrate Judge